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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1167

GEORGE J. ROUX,

Petitioner,

versus

NEW ORLEANS POLICE DEPARTMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

WILLIAM F. WESSEL
Attorney for Petitioner
1605 National Bank of
Commerce Building
New Orleans, Louisiana 70112

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner, George J. Roux, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered in the above entitled case on October 23, 1969, No. 50,065 of the docket of that Court.

OPINIONS BELOW

Administrative Hearing: The opinion and findings of the Civil Service Commission of New Orleans was rendered on September 6, 1968. It was not reported, but is founded in the Appendix at p. 16.

Court of Appeals: The Fourth Circuit Court of Appeals, State of Louisiana, entered its decision affirming the Civil Service Commission on June 2, 1969 and

rehearing was refused on July 7, 1969. It is reported at 223 So. 2d 905 (1969) and is found in the Appendix at p. 41.

Supreme Court of Louisiana: The decree and mandate of the Supreme Court of Louisiana refusing application for Writ of Certiorari was entered on October 23, 1969. It is reported at 227 S.2d 148 (1969) and found at Appendix, p. 58. The Supreme Court wrote no opinion.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered in October 23, 1969 at which time it became final.

An Order extending the time within which to file this petition until February 10, 1969 was signed by Mr. Justice Black on January 21, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether a police officer was denied due process of law when he was fired for refusing to submit to a polygraph test during the course of a homicide investigation which led to the police department.

CONSTITUTION AND REGULATIONS CONSTRUED

I. CONSTITUTION OF THE UNITED STATES:

AMENDMENT FIVE provides in part:
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

AMENDMENT 9.
"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT 14 provides in part:
". . . Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

II. CONSTITUTION OF LOUISIANA, 1921.

ART. XIV, Sec. 15(P) (1) provides:
"If any member of the State or City Commissions or any officer or employee in the State or City Civil Service shall wilfully refuse or fail to appear before any Civil Service Commission, court, or judge, any legislative committee, or any officer, board or body author-

ized to conduct any hearing or inquiry, or having appeared shall refuse to testify or answer any question relating to the affairs or government of the State or city, or the conduct of any State or City officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry, he shall forfeit his office or position and shall not be eligible thereafter for appointment to any position in the State or City Service for a period of ten years."

III. RULES FOR THE ADMINISTRATION OF THE DEPARTMENT OF POLICE.

Article 27. Standard of ethics

A member shall always conduct himself in accordance with the highest degree of morality which is required of the law enforcement profession. He shall act in a manner which will not reflect discredit upon himself or the Department.

Article 54. Instructions from proper authority

A member shall promptly and fully abide by or execute instructions issuing from any authoritative source.

If the instructions are reasonably believed to conflict with these Rules or other instruc-

tions this fact shall respectfully be made known to the issuing authority. If the issuing authority elects to insist upon the execution of the instructions then only he shall be held responsible should such conflict materialize. "However, no instructions shall be issued or executed which are violative of any law."

Article 59. Cooperation

A member shall promptly and sincerely cooperate with other members in the performance of their duty, and with all persons in carrying out the provisions of this Title.

STATEMENT OF THE CASE

On February 25, 1969, the body of a young lady was found in her apartment. Evidence only known to the New Orleans Police Department and not brought out in the hearing below pointed to a suspicion by members of the hierarchy of New Orleans Police Department that the decedent was having affairs with some unknown policemen assigned to the First and Eighth districts. One document contained in the decedent's effects had some first names contained thereon, one in particular was "George". There were many policemen whose first names were "George", R-42. George Roux was a member of the First District. He was questioned by his superior officers and gave two written statements, answering all questions and agreeing to submit to fingernail scraping and pubic hair tests. Exhibits 2 and 3, Record pp. 169, 178.

He was then ordered to submit to a polygraph examination which he refused. He was suspended and then fired. The reasons for his dismissal were for violation of the Rules for Administration of the Department of Police, Article 27 relative to "Standard of Ethics"; Article 59 relative to "Cooperation"; and Article 54 relative to "Instructions from proper Authority".

When petitioner was asked and later ordered to take a polygraph, he refused because he believed it was his "civil and constitutional right to refuse to take the polygraph." R-169, at 174.

Upon his dismissal, petitioner appealed to the Civil Service Commission and raised the federal questions in his notice of appeal. R-9.

The Civil Service Commission upheld the dismissal by the Superintendent of Police and petitioner appealed to the Fourth Circuit Court of Appeals. R-154. The federal question was preserved in the Assignment of Errors filed with the Civil Service Commission. R-156.

The federal questions were briefed and argued in the Court of Appeals, re-urged in the petition for rehearing, and in the application for writs to the Supreme Court of Louisiana.

In each instance, the federal questions were decided adversely to the petitioner. Appendix, *seriatim*.

REASONS FOR GRANTING THE WRIT

1. Due Process And The Fifth Amendment Prohibit The Dismissal Of A Police Officer From His Job For His Refusal To Submit To A Polygraph.

The Courts and Commission below has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

The Civil Service Commission below as well as the Court of Appeals and Supreme Court of Louisiana in each instance cite *La. Const.* Art. XIV, Sec. 15(P)(1) as controlling authority for the proposition that a policeman may be fired for relying on the Fifth Amendment. This Court, however, has held such provisions as violative of the U.S. Constitutions. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 1493 (1964); *Murphy v. Waterfront*, 378 U.S. 52, 84 S.Ct. 594 (1964); *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967); *Uniformed Sanitation Men Assoc. v. Commission*, 392 U.S. 280, 88 S.Ct. 1917 (1968); *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913 (1968).

If there were any doubt as to the meaning of these cases vis a vis *La. Const.* Art. XIV, Sec. 15(P) (1), *Perla v. N.Y.*, 392 U.S. 296, 88 S.Ct. 2062 (1968) should certainly resolve it. In *Perla*, this Court summarily reversed, citing *Gardner v. Broderick*, *supra*, where the Acting Head Parking Fee Collector of Buffalo was fired for refusing to waive immunity[1] in a Grand Jury

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[1]Louisiana has no iramunity statute

investigation, and thereby refused to testify. See Facts and Opinion, 21 N.Y.S. 2d 957, 21 N.Y. 2d 608, 237 N.E. 2d 215.

The similarity of the cases is that petitioner, Roux, though considered by the police to be a suspect in a homicide investigation, (R-42, 44, 83 reflects that every police officer was a suspect, especially those of the First and Eighth Precincts) was ordered to answer questions relative to the investigation under a polygraph. He refused — as did *Gardner* and *Perla* — as a result of which he was fired.

Unlike the cited cases, however, petitioner did cooperate by giving statements relative to his official duty and agreed to submit to pubic hair and fingernail scraping tests. R. 169-178. The Civil Service Commission and Court of Appeals found him to be truthful and cooperative in the investigation. Appendix infra. Thus this case obviates the question not reached by *Garrity v. New Jersey, supra.*[2]

At this point, however, petitioner was ordered to have his statements verified by a polygraph. He refused feeling he 'had a constitutional right not to do so.' He was fired for "refusing to have the statements verified by the polygraph machine;" R. 72, even though no superior officer had a reason to doubt or suspect Roux's veracity. R. 40, 49, 58.

[2] "Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify, is a question we did not reach." *Spevack v. Klein*, 385 U.S. 311, 87 S.Ct. 625 (1967) footnote 3 at p. 514.

Petitioner submits that it makes no difference whether one stands on his constitutional rights before a Grand Jury — as in *Gardner* — or before a lie box — as here. Police also enjoy first class citizenship. cf. *Spevack v. Klein*, 392 U.S. at p. 514.

> "Where the choice is between the rock and the whirlpool, duress is inherent in deciding to waive one or the other." *Garrity v. N.J.*, supra, 87 S.Ct. at 496.

The choice Roux had was to navigate in unchartered waters with no statutory aegis to guide him in his choice as between the Scylla of losing his job if he avoided taking the polygraph and the Charybdis of the danger of loss of job if he flunked the polygraph or the twin danger of possible criminal prosecution.

Due process does not extend only to formal court proceedings. Where the scope of the investigating body extends to violation of criminal laws, the requirements of due process obtain. *Jenkins v. McKeithen*, ___ U.S. ___ 89 S.Ct. 1843 (1969). In the instant case, petitioner had no opportunity to cross examine the lie-box; had no way of determining how the lie box was judging his veracity. There is abundant authority for the fact that polygraphs are unreliable.[3]

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[3]Warren Commission Report on Kennedy Assassination, 815 (off ed. 1964); Inbau & Reid, *Lie Detection & Criminal Interrogation*, 63 (1942); Sternbach, Gustafson and Colier, *Don't Trust the Lie Detector*, Harvard Bus. Rev. Nov-Dec. 1962, p.127; Burkey, *The Case Against the Polygraph*, 51 Am. Bar Jour. 855, 857 (1965).

This record also reflects that there is no statute nor police regulation which authorizes or requires a polygraph. This was the first time that a polygraph had ever been required of a police officer of New Orleans Police Department. R-54. There was never such a requirement in existence until petitioner was required to take the test. The "Rules for the Administration of the Department of Police" also state:

> "These Rules shall not be construed so as to restrict the civil rights of members..." Art. 15, Exhibit R-8, R. at p. 205. See also Art. XIV, Ex. R-9 relative to polygraph; R. pg. 206.

What is significant here is that all the while the investigation here was focusing in on petitioner. *Escobedo v. Ill.*, 378 U.S. 478, 84 S.Ct. 1758 (1964); *Miranda v. Ariz.*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Petitioner was asked (and he agreed) to give fingernail scrapings and pubic hair samples. R-170, 177.

The requirement of taking a lie detector test is therefore an impermissible burden on the privilege against self-incrimination. It goes beyond any right that the public employer may have relative to inquiring about official duties.

Since Louisiana has no immunity statute, petitioner was put in the exact same position as *Gardner v. Broderick*, in that he would have, *in fact*, been subject to prosecution, the same as *Gardner* would have been had he signed the waiver. Roux therefore had the same choice between the rock and the whirlpool.

II. Petitioner Is Entitled To The Protection Of Natural As Well As Legal Rights.

If the Fifth Amendment reflects the "moral striving of the community"; if it is a "reflection of our common conscience, a symbol of the America which stirs our hearts,"[4] then the requirement that petitioner place his fate in the hands of a machine, amounts to a frustration of this American symbol. The requirement of a polygraph is arbitrary and offends the dictates of reason and therefore the Due Process clause of the Fourteenth Amendment.

The right not to take it without penalty is a quiescent right, a natural right[5] which should find protection under the Ninth Amendment and penumbra of the Fifth Amendment. As government becomes modern, it tends to enter areas of personal life that may not have been traditionally recognized under the first eight amendments. But those areas are just as deserving of protection against infringement that may be subtle, perhaps, and even well-meaning, but nevertheless, devastating, insidious and complete.

Man's ingenuity in devising such modern day devices as the polygraph should not be allowed to succeed in out-flanking the law. Petitioner suggests that there is a zone of privacy of the mind which exists within the penumbra of the guarantee against self-incrimination and relieves this petitioner from the order directed to

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[4]Griswold, *The Fifth Amendment Today*, p. 73(1965)

[5]Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, 346 (1915)
"Those which are secured are called legal rights, those which ought to be secured are called natural rights."

him to take the polygraph. See *Griswold v. Conn.*, 381 U.S. 479, 484, 85 S.Ct. 1678 (1965).

There are rights of a constitutional stature whose exercise a state may not condition by exaction of a price." *Garrity v. N.J.*, supra, 87 S.Ct. 616, at 620. The price petitioner was forced to pay for exercising his right was his job. The loss of "professional standing, professional reputation, and of livlihood are powerful forms of compulsion..." *Spevack v. Klein*, supra, 87 S. Ct. at 628.[6]

III. The Federal Constitutional Question Is Important To Every State In Establishing Guidelines For Public Employment

If the questions presented by this case have not already been answered by *Gardner and Uniformed Sanitation Men*, then it is a question which this Court should answer because it is a recurring question of critical importance in the area of public employment.

There are decisional threads in *Garrity*, *Gardner* and *Uniformed Sanitation Men* which may need unravelling in the instant case. This case is the obverse of *Garrity* in that petitioner was neither tried or convicted on his statements. It is similar to *Gardner* in the respect that petitioner was in the position where he could not obtain immunity and *Gardner* was required to waive immunity. It is closer to *Uniformed Sanitation Men*, in that petitioner, like 12 of the 15 men in that case, was dis-

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[6] "You take my life when you do take the means whereby I live." Shakespeare, *Merchant of Venice* (Shylock, Act. IV, Scene 1)

charged for refusing to testify at an administrative hearing. Here the administrative hearing was before the Chief of Police and the lie box.

California has approved of the type of coercion here exemplified, *Fichera v. State Personnel Board*, 32 Cal. Rep. 159 (Cal.App.1963); *McCain v. Sheridan*, 160 Cal. App.2d 174, 324 P.2d 923 (1958); *Frazee v. Civil Service Board*, 170 Cal.App. 2d 333, 338 P.2d 943 (Cal. App.1959); under special circumstances. These were all pre-*Garrity, Gardner, Uniformed Sanitation Men* decisions.

Connecticut, Pennsylvania and Florida take a contrary view. *Moleno v. Board of Pub. Safety*, 225 A.2d 805 (Conn. 1966); *Stapes v. Civil Service Comm.*, 404 Penna. 354, 172 A.2d 161 (1961); *DeVito v. Civil Service Comm.*, 404 Penna. 354, 172 A.2d 161 (1961); *Swope v. Fla. Ind. Comm.*, 159 S.2d 653 (Fla.App. 1963).

Seven states have prohibited the use of polygraph examinations of employees as a condition of employment. *Alaska Ann. Stats.* Sec. 23.10.037 (1964); *Calif. Labor Code* Sec. 432.2; *Hawaii Laws*, Act 168; *Mass. Gen. Laws*, ch. 149, Sec. 19B; *Ore. Rev. Stats.*, 249 p.33 (1963); *R-I Gen. Laws*, ch. 6.1 (1964); *Wash. Rev. Code*, ch. 152 (1965).

A comprehensive analysis on the law governing lie detectors and its impact on the rights of employees, both public and private, is found in the 1965 Report of Section of Labor Relations Law of the Amer. Bar Assn., pp. 288-297. See also Burkey, *Lie Detectors in Labor Relations*, 19 Arb. J.193; Burkey, *The Case Against the Polygraph*, 51 Am. Bar Jour. 855(1965).

The singular problem that the use of the polygraph evokes in a society that has become almost monolithically bureaucratic is that once the polygraph test is administered to a public employee its results are invariably stashed away in his employment jacket, eventually to be used against him in future promotion, discipline or transfer. And the results are usually known only to the employer, evoking shades of an Orwellian "Big Brother."

CONCLUSION

The time has not come when the exercise of the highest intelligence and discretion of which the human mind is capable, i.e. the ascertainment of truth, can be turned over to a machine. The New Orleans Police Department has no power to compel an employee to do an act, the results of which can serve only to jeopardize his job and reputation on the one hand or run the risk of incrimination and criminal charges on the other.

The present case is illustrative of persistent and serious misapplication of the law by the Courts in Louisiana. Whereas *Gardner v. Broderick*, supra, and *Uniformed Sanitation Men's Assn. v. Commissioner*, supra, as well as *Malloy v. Hogan*, supra, and *Murphy v. Waterfront*, supra, have already rejected State Constitutional Doctrines such as La. Const. Art. XIV, Sec. 15(P)(1), this case should be summarily reversed.

Summary reversal is appropriate in this case. It is consistent with this Court's practice in cases where the

law is settled by a prior decision, e.g. *Perla v. N.Y.*, 392 U.S. 296, 88 S.Ct. 2062 (1968).

The writ should be granted and the case reversed.

Respectfully submitted:

WILLIAM F. WESSEL
Attorney for Petitioner
1605 National Bank of
Commerce Building
New Orleans, Louisiana 70112

APPENDIX

OPINION OF CIVIL SERVICE COMMISSION OF NEW ORLEANS

GEORGE J. ROUX, JR.

vs. City of New Orleans
Civil Service Commission
No. 440-A

DEPARTMENT OF POLICE

Appellant, GEORGE J. ROUX, JR., received permanent status as a patrolman on the New Orleans Police Force May 25, 1966. In 1968, he was suspended by the Appointing Authority for the period January 30, 1968, through February 18, 1968, which suspension he timely appealed and which appeal is presently under advisement by this Commission. See Docket No. 436. On March 7, 1968, Patrolman Roux was suspended following events unrelated to the prior suspension and subsequently dismissed from the Police Force on April 23, 1968. This suspension and dismissal formed the basis of Appeal Docket No. 440-A. The appeal from the suspension in Case No. 440-A was filed April 11, 1968, more than thirty days after the suspension and, in accordance with the rules of this Commission, was not timely filed. The appeal from the dismissal of April 23, 1968, was, however, timely filed and it, alone, forms the subject matter of this opinion.

A copy of the letter of dismissal addressed to appellant by the Appointing Authority dated April 23, 1968, is annexed hereto as if set out herein in extenso.

On May 24, 1968, both appellant and the Appointing Authority were represented before this Commission by legal counsel, at a hearing which revealed the following:

On February 25, 1968, the body of a teen-age girl was discovered at her apartment in the Bienville Housing Project. Investigating officers immediately learned from the last person known to have seen the girl alive that she had been expecting a visit on the evening of her death from her "boy friend" on the Police Force. The following day, investigators found among the effects of the deceased a document containing, among other information, the names of various members of the New Orleans Police Force assigned to the First and Eighth District Police Stations. By administrative order, the Superintendent of Police instructed his Chief of Detectives to investigate by interrogation or such other investigatory devices as in his discretion deemed necessary, all men assigned to the First and Eighth District Police Stations. The Superintendent of Police believed that the urgency of the situation required a crash investigation, particularly to collect and glean from the members of the First and Eighth Districts all information or bits of information which might assist in the Department's investigation and effect an early solution to an apparent homicide. Of equal urgency was the belief of the Superintendent of Police that he should avoid or minimize any adverse publicity which could result for the Department from any implication of

wrong doing by one of its members. Which policemen would be interrogated, the extent of each interrogation and who would be required to take a polygraph test was left to the discretion of the Chief of Detectives.

Officers of the First and Eighth Districts were interrogated, subjected to tests and examinations of their fingernail scrapings and pubic hair. Written statements were obtained, and in some instances such as appellant, more than one such written statement was obtained. Additionally, polygraph tests were administered in numerous instances and additional investigations made at the homes of some policemen with accompanying interrogation of their families to verify information contained in the prior statements of the police officers. The use of the polygraph test was also for the purpose of attempted verification of prior statements, and although policemen had been subjected to such tests on prior occasions, the use of the polygraph test had been on a voluntary basis at least for the past nine or ten years that the incumbent Superintendent of Police had been in office. During such tenure, the Superintendent had never before found it necessary to directly order any member of the Police Force to submit to a polygraph test.

When appellant was first questioned by the Chief of Detectives, he cooperated voluntarily and fully, answering all questions propounded him. Appellant submitted to routine tests and inspections of his body, submitting fingernail scrapings and pubic hair samples. Perhaps, it was because the given name "George" appeared in the diary of the deceased, or for some other reason unknown to this Commission, that appellant was one of

the officers requested to submit to the additional investigatory device, namely, the polygraph test. On March 6, 1968, the Chief of Detectives requested appellant to submit to a polygraph test. Appellant refused. Appellant was then ordered to submit to the test and upon his continued refusal, the Chief of Detectives suspended appellant from the Police Force. Up to this point in the investigation, appellant had no legal counsel.

On March 11, 1968, appellant, with legal counsel present, conferred with then Captain Joseph H. Murry, Supervisor of the Patrol Bureau, in an apparent unofficial conference in which Captain Murry attempted to persuade appellant to voluntarily take a polygraph test. On advice of counsel, appellant refused. On March 21, 1968, appellant was instructed to report to the Office of Captain Murry where in the presence of Appellant's counsel, appellant was requested by Captain Murry to submit to a polygraph test and informed that his continued refusal to cooperate and non-compliance if ordered to take the test would subject him to dismissal from the Police Force. Appellant again refused to change or reconsider his position and refused to take the test.

Finally, on March 27, 1968, appellant was instructed to report to the Office of the Superintendent of Police, where in the presence of his legal counsel, appellant refused the Superintendent's request that he voluntarily submit to the test. Appellant was again cited Article XIV Section 15 (P)(1) of the Louisiana Constitution of 1921 denying members of the classified service the privilege of retaining their classified position while

choosing to remain silent when questioned about municipal affairs or conduct of municipal employees. Appellant and his counsel were also offered the opportunity to review and agree which questions would be included in the proposed polygraph test, all to no avail. Upon being given a direct order to take a polygraph test, appellant refused and his dismissal became effective at that time because of his refusal to obey a direct order of the Superintendent and his failure to cooperate in the intra-departmental investigation.

The thrust of appellant's appeal is two-fold. In essence, appellant argues that the order requiring him to submit to a polygraph test was unlawful and violative of due process of law and various guarantees of both Federal and State Constitutions. Secondly, appellant argues that the order of the Appointing Authority was arbitrary and unreasonable in view of all circumstances. Considering the latter argument first, it is appellant's position that he fully and truthfully cooperate with the Appointing Authority by voluntarily giving written statements concerning his activities and relative to his knowledge or lack thereof of the deceased and fellow officers known to him who might have been acquainted with the deceased. Furthermore, he voluntarily submitted to inspection of his person and underwent other tests, there being no cause, by virtue of his overt voluntary cooperation, to doubt his veracity, and his actions in no manner discredited the Police Department.

According to the letter of dismissal, appellant based his refusal to submit to a polygraph test when ordered to do so on the grounds that he had a "Constitutional and

civil right to refuse" and that his superior "did not have the authority to order" that he submit to the test.

Appellant's testimony before this Commission revealed that his refusal was due, first, to the knowledge that the polygraph test was not an accurate device and that its results were inadmissible as valid evidence in a court of law; second, that due to its inaccuracy, appellant feared the results of the test would jeopardize his reputation and career; third, that he was in a dilemma having to choose between taking and perhaps failing the test which might result in charges being brought against him, or refusing to take the test and being suspended or dismissed because of his refusal; fourth, that he had a constitutional right to refuse to take a polygraph test and that the Police Manual with respect to the rights of an arrestee provided that no citizen could be compelled to take the test; and finally, that his superiors had no cause or reason to doubt his veracity and ask that he submit to the test for the purpose of verifying his prior statements.

In his various briefs and in his motion of appeal, appellant argues, in the main, that the acts of the Appointing Authority denied appellant the right guaranteed him in both Federal and State Constitutions, namely, the privilege against self-incrimination, citing as authority therefor the June, 1968, decisions of the U. S. Supreme Court in, *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York*, No. 823 June 10, 1968, ____ U. S. ____ (1968); *Gardner v. Broderick*, No. 635, June 10, 1968, ____ U. S. ____ (1968); as well as *Molino v. Board of Pub. Safe. of City of Torrington*, 225 A 2d 805 (S.C. Conn. 1966); and

Stape v. Civil Service Comm. of City of Philadelphia, 404 Pa. 354, 172 A 2d 161 (1961).

The Appointing Authority argues that under the circumstances of the case the use of the polygraph test as an investigatory device was a reasonable and justified expedient exercise of administrative discretion and authority in the conduct of an intra-departmental investigation of an apparent homicide, which conceivably involved members of the police force. Furthermore, that appellant's refusal to accede to a direct order of his superior was violative of the departmental rules of administration, and that appellant's continuing refusal to obey manifested insubordination and failure to cooperate in an investigation which action was a discredit not only to the Police Department, but also to appellant, who, as a public symbol sworn to uphold and enforce the law, acted in direct opposition to the conduct expected of him; and finally, it is argued by the Appointing Authority that the provisions of the Bill of Rights of the Louisiana Constitution with respect to the right of an individual to remain silent are conditioned by Article XIV Section 15 (P)(1) of the Louisiana Constitution with respect to employees in the classified service, citing as authority for the latter contention, *Callahan v. New Orleans Police Department*, 171 So. 2d 730 (1965) and for the former contentions various cases from the Appellate Courts of the State of California upholding the dismissal of police officers who refused to submit to a polygraph test when ordered by their superior to do so, viz. *McCain v. Sheridan*, 160 Cal. App. 2d 174, 324 P 2d 923 (1958); *Frazee v. Civil Service Board of City of Oakland*, 170 Cal. App. 2d 333, 338 P 2d 943 (1959), and

Fichera v. State Personnel Board, 32 Cal. Reptr. 159 (Dist. Crt. App. 1963).

The issues before this Commission are whether or not under the circumstances of this case and the law of this State the Superintendent of Police can compel a member of the Police Force to submit to a polygraph test upon pain of dismissal if the policeman refuses, without thereby violating the policeman's constitutional privilege against self-incrimination which permits him to remain silent, and if such authority reposes in the Superintendent of Police, was his exercise thereof reasonable under all of the circumstances of the instant case. The Commission answers both of these questions affirmatively.

Pretermitting for the moment the very recent U. S. Supreme Court decisions cited by the appellant, it is the view of this Commission that the cases relied on as authority by the appellant are distinguishable from the case at bar and far less compelling than the rationale of the cases cited by the Appointing Authority in support of its position.

In the Molino case, op. cit. supra, three police officers were discovered on business premises late at night by an official of the business. One of the officers was off duty at the time although their explanation for their presence on the premises was that in checking the area they found the premises open and had entered to investigate. In the ensuing investigation, and following orders given him by the Town Board of Public Safety, the Chief of Police ordered the three officers to submit to a polygraph test. They refused and were suspended for

various derelictions of duty, including refusal to cooperate in an official investigation and refusal to take a polygraph test. When the State Police entered the investigation, the three suspended officers refused to submit to any further interrogation of any sort. The Court found that on the evidence presented the officers had neither been untruthful nor uncooperative and that the charges were not in themselves proper grounds for dismissal. The case does not refer to any Connecticut law comparable to Louisiana Constitution Article XIV Section 15 (1974). Nor were the officers specifically charged with refusal to obey a direct order of their superior.

In the Stape case, op. cit. supra, two police officers were called to investigate business premises which the night watchman had discovered unlocked. The following day various cash and checks were found to be missing from the premises and one of the missing checks was discovered in the officer's police car. In the ensuing investigation the officers voluntarily answered all questions and agreed to submit to a polygraph test, but prior to taking the test and upon advice of counsel, the officers reconsidered and refused to submit to the test. Continued refusal resulted in dismissal from the Police Force. The Civil Service Commission, to whom the officers appealed, upheld the dismissal on the grounds of insubordination and neglect of duty based upon the refusal to submit to a polygraph test. In reinstating the two officers, the Court devoting the majority of its opinion to a consideration of a procedural question, disposed in cursory manner the question of alleged denial of due process, and held with respect thereto, that the authority of the Civil Service regulations which permit an employer to dismiss an employee for "just

cause," had been exceeded, and while "just cause" was not defined, the Court was of the opinion that it did not include a refusal to take a polygraph test, and further, that no City ordinance or State statute required an employee to submit to a polygraph test or suffer dismissal for his refusal.

Much more compelling, yet obviously distinguishable from the case at bar, are the June, 1968, decisions of the U. S. Supreme Court cited by appellant in his supplemental memorandum.

In the Uniformed Sanitation Men's case, op. cit. supra, fifteen City employees by way of declaratory judgment appealed their dismissal from their jobs alleging violation of their constitutional right guaranteeing to them the privilege against self-incrimination. Called before the Commissioner conducting an investigation into alleged corrupt practices in the New York City Sanitation Department, twelve appellants refused to testify, although their silence subjected them to dismissal as provided by provisions of the New York City Charter, which, parenthetically, contains a mandate couched in similar language to Article XIV Section 15 (P)(1) of the Louisiana Constitution. These twelve employees were dismissed for the specific reason that they invoked the Fifth Amendment of the Federal Constitution and refused to testify after being informed that whatever they said would be held against them. The remaining three appellants answered the questions, but when called before the Grand Jury and asked to waive immunity from prosecution, they, too, invoked the silence of the Fifth Amendment and were, for this reason, dismissed from City employment after having been

instructed before the Grand Jury to sign waivers of immunity from subsequent prosecution.

These dismissals were squarely based upon the refusal of the appellants to waive immunity as a condition precedent to giving testimony and, what amounts to a waiver of immunity, being told that whatever they might say would be held against them in subsequent criminal proceedings. Upon these facts, the Supreme Court held that every citizen, notwithstanding those in a position of public trust, was entitled to protection from self-incrimination. However, with respect to public employees, the protection was not pronounced by the Court to be categorical so as to protect and retain the public employee in his public job. Without specifically saying so, the Supreme Court in effect, apparently restricted that phrase of the New York Charter, comparable to Article XIV Section 15 (P)(1) of the Louisiana Constitution, which provides for the termination of an employee who will not waive immunity from prosecution when called upon to testify with respect to his actions, conduct, official duties or knowledge bearing upon governmental affairs. Silence when waiver of immunity is required is not grounds for dismissal. A public employee cannot be dismissed from his job when such dismissal is based upon violation of his right to the silence provided by the Fifth Amendment. When he is compelled to waive immunity from prosecution by threats of the loss of his job if he refuses to testify and remains silent, his Constitutional guarantees have been violated. The Court specifically recognized and upheld, however, the right of an Appointing Authority to discharge a municipal employee for refusal to account for his own conduct in the performance of his public duties.

What the Supreme Court has said, quite properly, is that absent compelled waiver of immunity from subsequent prosecution, and absent the expressed intended use against the employee of whatever he may say, the employer has every right to make reasonable investigations in which the employee must cooperate, testify, and give such information as he may have regarding his official activities, his conduct and knowledge, upon penalty of dismissal if he refuses so to do.

Similarly, in *Gardner v. Broderick*, op. cit. supra, where a New York City policeman was called before the County Grand Jury investigating gambling activities, ordered to sign a waiver of immunity from prosecution and then answer all questions propounded him, his refusal to do so was upheld by the Supreme Court. The police officer had been dismissed solely for refusing to waive his constitutional privilege against self-incrimination by signing a waiver of immunity from prosecution. After noting that answers from a public employee may be compelled regardless of the privilege against self-incrimination when there is immunity from subsequent use of the compelled testimony, the Court considered the question in the Gardner case to be whether or not a policeman who refuses to waive the protection accorded him by Constitutional guarantee can be dismissed from office for refusing to waive such guaranteed protection. After distinguishing *Garrity v. New Jersey*, 385 U. S. 493 (1967), in which case the Supreme Court reinstated dismissed police officers who confessed a crime when given a choice of either incriminating themselves or losing their jobs, holding that forced testimony was improper evidence in a subsequent criminal proceeding, and *Spevack v. Klein*, 385

U. S. 511 (1967), reversing the disbarment of a lawyer who refused to testify at his disciplinary proceeding and was consequently disbarred, which situation prompted the Supreme Court to acknowledge that the question of public trust differentiated the lawyer from the policeman, the Supreme Court stated in the Gardner case,

> "If appellant, a policeman, had refused to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereto in criminal prosecution of himself, *Garrity v. New Jersey*, op. cit. supra, the privilege against self-incrimination would not have been a bar to dismissal. The facts of this case, however, do not present this issue. Here, petitioner was summoned to testify before a Grand Jury in an investigation of alleged criminal conduct. He was discharged from office not for failure to answer relevant questions about his official duties, but for refusing to waive a constitutional right. He was dismissed for failure to relinquish the protection of the privilege against self-incrimination. The Constitution of New York State and the City Charter both expressly provided that his failure to do so as well as his failure to testify, would result in dismissal from his job. He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege." . . . . "It is clear that petitioner's

testimony was demanded before the Grand Jury in part so that it might be used to prosecute him and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would be no reason to seek to compel petitioner to waive his immunity."

The Appointing Authority cites three California cases in support of its position in which an order to submit to a polygraph test was found to have been a reasonable exercise of authority warranting the dismissal of the police officers involved in each case.

In the McCain case, op. cit. supra, a full scale departmental investigation was initiated when the misappropriation of bail money was discovered. Some eighteen policemen connected with the cash bail desk believed themselves to be suspects in the investigation in which submission to polygraph tests was requested of them. The appellant submitted to one polygraph test which he failed, not aware that the test was a "trick test." When informed that the proposed second test was the true one, appellant refused to submit to the second test and was dismissed for insubordination and disobedience to an order manifesting conduct unbecoming a police officer. In upholding his dismissal the Court found that the orders of the Chief of Police were reasonable under the circumstances and that appellant's refusal was a contradiction of the appropriate discharge of the public trust imposed upon him. The Court noted that the exercise by a police officer of his constitutional right against self-incrimination can and therein did constitute a ground for his dismissal. It

should be noted here that this Commission finds no conflict with the holding of the Court in the McCain case and the 1968 U. S. Supreme Court decisions above referred to.

In the Frazee, op. cit. supra, the California District Court of Appeal again was presented the question of refusal by a police officer to submit to a polygraph test ordered by a Chief of Police as grounds for the policeman's dismissal. The officer, accused by a citizen of an attempt to commit a felony, argued that the Appointing Authority's order was unreasonable and since the results of a polygraph test were inadmissible in evidence, the officer was being ordered to submit to a useless, idle act, in an investigation in which he, himself, was implicated as a wrongdoer. The Court held that as a guardian of the peace and symbol of public trust the officer was duty bound to make disclosure of information, even if such disclosure tended to show he had engaged in criminal activities. This, of course, antedated the Garrity decision which holds that such disclosure being coerced testimony cannot be used against an individual in a subsequent criminal prosecution. In the Frazee case, as in the case at bar, there was no evidence of any attempt to force a waiver of immunity from use of coerced evidence. Certainly, a public employee, particularly a policeman, can be compelled to answer questions relating to his activities or that of others in an official investigation, upon penalty of dismissal should he refuse to answer. It is the combination of compelling answers and forcing waiver of immunity as a condition precedent to retaining one's job which is violative of due process and prohibited.

In the Fichera case, op. cit. supra, the California Court in 1963 had before it a mandamus proceeding in which a policeman sought reinstatement after dismissal for refusing to submit to a polygraph test which he was ordered to take in an intra-departmental investigation. Although several policemen were assured that their constitutional rights, apparently against waiver of immunity from subsequent prosecution, would not be violated, two officers, including appellant refused to obey the order of the Superintendent of Police on the grounds of "principal and constitutional rights." Unlike McCain, in which a theft had been committed and Frazee, in which an attempt to commit a felony had been charged, there was no crime or charge in the Fichera case. The Court noted, however, that the Appointing Authority was confronted with a situation in which it had good and reasonable cause to proceed as it did under the circumstances. The Court noted that while the fallibility of the polygraph test was well known, it did have some value in limiting and channeling investigation, and the Appointing Authority did not act unreasonably in ordering the test to be given to the police officer. The Court further stated that in its view the appellant was not entitled to withhold the means of investigation and at the same time retain his position as a policeman.

In the Callahan case, op. cit. supra, the Fourth District Court of Appeal of Louisiana held that Article XIV Section 15 (P) (1) was constitutional and did not violate the guarantee against self-incrimination embodied in Article I Section 11 of the Louisiana Constitution, since Section 11 contains the clause "except

as otherwise provided in this Constitution." The Court was also of the express opinion that Callahan had no inalienable right to employment as a police officer and that protection of the public interest against law violation transcended any right Callahan had in his position, and that his discharge was warranted when he pleaded the Fifth Amendment at his disciplinary hearing before the New Orleans Civil Service Commission. Appellant therein had invoked the privilege because of a pending criminal proceeding in which he was the defendant. Quite obviously, Callahan is distinguishable on its facts from the case at bar, but the rationale of the Court's holding in support of Article XIV Section 15 (P) (1) as applied to municipal employees is compelling in the instant case and adopted by this Commission. In Callahan, due process was not held to have been denied appellant by constitutional abridgement of his right against self-incrimination as he was neither forced to waive immunity from prosecution in his appeal before this Commission nor threatened that what he said would be held against him.

In the case now before this Commission, Patrolman Roux laid much stress on the fact that he believed himself to be a suspect in a homicide investigation based upon reports from his fellow officers that the Chief of the Detective Bureau had indicated that all members of the First and Eighth Police Districts were suspects. The obvious intent of appellant's position was to show that the action of the Appointing Authority in ordering his submission to a polygraph test violated his constitutional guarantee against self-incrimination.

This position is immediately inconsistent with the evidence, because appellant was at no time asked to waive immunity. Appellant, further, lays great stress upon his complete cooperation in answering all questions propounded him, giving several written statements to his interrogators and voluntarily submitting to other potentially incriminating tests. Viewed from the Appointing Authority's position, Roux was willing to cooperate only so far as he deemed it proper. In effect, Roux substituted his judgment as to what was proper for that of his superiors in their conduct of an intra-departmental investigation.

The evidence is uncontroverted that at no time was Roux asked or ordered to waive immunity from prosecution. It is equally clear that Roux was repeatedly informed by his superiors, including the Superintendent of Police, that he, Roux, was not a suspect to any crime. He was at no time charged with any crime, arrested or threatened with charges. Nor was he threatened with dismissal if the polygraph test results were adverse to him.

The reason for ordering a polygraph test was made clear to appellant. The Superintendent informed appellant and appellant's counsel of what questions would be asked on the polygraph test, and even submitted a list of questions to be agreed upon for use in the test, all of which questions dealt with appellant's official conduct, activities and knowledge or lack of knowledge of matters pertinent to the subject under investigation.

Appellant remained steadfast in his refusal to submit to the polygraph test and even when informed of the mandate contained in the Louisiana Constitution referred to above. The inconsistency and impropriety of appellant's position is further reflected by his admitted knowledge that the results of a polygraph test would not be admissible in a court of law. He knew or should have known that forced or coerced testimony or the fruits thereof could not be used against him in a subsequent proceeding. The position of the Appointing Authority was thoroughly explained to him, and his refusal to obey a direct order of the Superintendent of Police, after repeated requests, manifested disobedience, under the circumstances which resulted in dismissal. It was the contention of the Superintendent of Police that requiring members of his command to submit to a polygraph test was a reasonable order. The circumstances of the case required an interview of and scrutiny of the activities of numerous officers, the urgency thereof being emphasized to ensure against departmental scandal as well as to investigate and quickly solve an apparent homicide. After appellant's suspension and continued refusal to obey an order, the thrust of the Appointing Authority's position shifted from concern over the use of the polygraph test as an investigatory aid to concern over the appellant's refusal to obey a direct order of a superior officer.

The Appointing Authority proved to the satisfaction of this Commission that it did not exceed its authority and that it acted reasonably under all of the circumstances of the case. The burden placed upon the appel-

lant to show otherwise was not carried. His constitutional guarantee of the privilege against self-incrimination was not violated and due process of law was afforded him. His continued refusal to take the polygraph test was without merit and violative of the provisions of the Louisiana Constitution and of the public trust reposed in appellant as a police officer.

FINDINGS OF FACT

1. The facts and circumstances surrounding an apparent homicide indicated the deceased was acquainted socially or otherwise with *unknown* members of the New Orleans Police Force assigned to the First and Eighth District Police Stations, each or all of whom may knowingly or unknowingly have possessed information pertinent to and helpful in the Police Department's official investigation of the death of the deceased.

2. The Superintendent of Police in the official conduct of his office and in the exercise of his discretion authorized the questioning of all policemen assigned to the First and Eighth Districts at the time of the death, including the use of polygraph tests and other investigatory devices and tests when deemed advisable by the Chief of the Detective Bureau in charge of the investigation of the death.

3. The members of the First and Eighth Police Districts were informed of the intra-departmental investigation, the reason therefor and were asked to

cooperate with the investigating officers, it being generally indicated that all policemen in the First and Eighth Districts could be considered suspects of a possible crime based on the content of the diary of the deceased and the statement of the last person known to have seen the deceased alive, that the deceased was expecting a visit from her policeman boy friend on the night of her death.

4. Appellant, and numerous other fellow police officers were interrogated, signed written statements, and submitted to an examination of their bodies and fingernail scraping and pubic hair tests. Many of the same policemen voluntarily submitted to a polygraph test for what it might be worth to corroborate earlier written or oral statements. However, appellant refused to submit to a polygraph test when first requested to do so by the Chief of Detectives.

5. Because of his refusal to submit to a polygraph test the appellant was suspended from the Police Force by the Chief of Detectives, but since the appeal from this suspension of March 6, 1968, was not timely filed within the thirty day period provided by the Rules of this Commission, the suspension is now final and need not be further considered.

6. During his suspension, appellant was repeatedly requested to reconsider his refusal to submit to a polygraph test. Appellant continued to refuse.

7. Other police officers who had originally refused to take a polygraph test reversed their position and took a polygraph test although appellant and five or six fellow officers steadfastly refused.

8. Appellant was ordered to the Office of the Superintendent of Police on March 27, 1968, where in the presence of his legal counsel the position of the Appointing Authority was explained to him in detail; the reason the Appointing Authority had made use of the polygraph test was explained to him and appellant and his counsel were offered questions to be reviewed and agreed upon in advance for use in appellant's polygraph test.

9. The evidence is uncontroverted, uncontradicted and categorically clear that appellant was told by the Superintendent of Police that he, the appellant, was not suspect to any crime, nor was he charged with any crime, nor was appellant an arrestee.

10. It is similarly uncontroverted, uncontradicted and categorically clear that at no time was appellant ordered or requested to waive immunity from prosecution in any subsequent proceedings which might evolve from the Appointing Authority's intra-departmental investigation.

11. Appellant knew of his own knowledge that the results of polygraph tests were inadmissible in evidence and expressed this as one of the reasons for not submitting to the test. Appellant also based his refusal on the grounds of the known fallibility

of polygraph tests. Further, this Commission finds that neither of these reasons present substantial or meritorious excuse for appellant's refusal to obey the order of the Superintendent of Police and was a direct violation of Section 59 of the Administrative Rules of the Department of Police.

12. Appellant refused to submit to the polygraph test because he believed his superiors had no right to order that he do so. Further, this Commission finds that in this contention, appellant placed his youthful judgment above that of his superiors and was in direct violation of the provisions of Section 54 of the Administrative Rules of the Department of Police.

13. Appellant was informed of the provisions of Article XIV Section 15 (P) (1) of the Louisiana Constitution, which he chose not to heed because of his belief that to act other than he did would deny him his constitutional right to remain silent and to say nothing that might tend to incriminate him. Further, this Commission finds that no guarantees or privileges were denied appellant, who was not asked to waive immunity from prosecution as a condition precedent, or otherwise, to answering questions asked of him in a polygraph test or submitting to a polygraph test for the expressly explained purpose of attempted verification of earlier statements obtained from him in an official intra-departmental investigation.

14. The actions of the Superintendent of Police were proper, warranted and reasonable under all circumstances of this case and did not manifest any abuse of authority, the propriety thereof being further buttressed by the Constitutional authority which requires a reading of Article I Section 11 together with Article XIV Section 15 (P) (1) as said sections relate to municipal employees.

15. Appellant was not shown to have been untruthful at any time; however, the propriety of his adamantine refusal to obey the order of his superiors was undertaken at his risk and did not meet with the standards required of a member of the law enforcement profession.

16. In view of appellant's truthfulness and his cooperation up to the time that he was requested to submit to a polygraph test, this Commission does not believe that the penalty provided in Article XIV Section 15 (P) (1) imposing ineligibility for future service in the classified service for a maximum of ten years should be invoked herein.

CONCLUSIONS

Appellant's Constitutional rights, privileges and guarantees were at no time placed in jeopardy in the case at bar. Under the circumstances appellant was bound to obey the order issued him by the Superintendent of Police. This Commission is of the opinion that in the instant situation a police officer may properly be compelled to answer questions propounded him

by polygraph test or otherwise with regard to his activities, duties, conduct and any information within his knowledge which may aid and abet an official investigation being conducted by the Police Department. This Commission does not find its position to be in the least inconsistent with the June, 1968, Supreme Court decisions cited herein above.

Finally, this Commission believes that the Louisiana Constitution wisely expresses a mandate that although a public employee may choose to invoke his privilege against self-incrimination, there is a concomitant right in the Appointing Authority to dismiss said employee from public employment and public trust, particularly where he is a symbol of law enforcement, if such employee will not categorically cooperate in a departmental investigation which, under the circumstances, in this case, included submitting to a polygraph test concerning subject matter inextricably related to appellant's public employment.

The appeal is dismissed.

RENDERED AT NEW ORLEANS, LOUISIANA, September 6, 1968.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION

(original signed) William M. Barnett
William M. Barnett, Chairman

(original signed) Mark W. Malloy
Mark W. Malloy, Commissioner

(original signed) Norman C. Francis
Norman C. Francis, Commissioner

COURT OF APPEAL
FOURTH CIRCUIT — STATE OF LOUISIANA

GEORGE J. ROUX

VS. No. 3482

NEW ORLEANS POLICE DEPARTMENT

APPEAL FROM THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS, No. 440 A

LESSLEY P. GARDINER
JUDGE

JUNE 2, 1969

(Court composed of Judges Godfrey Z. Regan, Chris T. Barnette and Lessley P. Gardiner)

WILLIAM F. WESSEL
F. JOSEPH DROLLA, JR.
FOR APPELLANT

ALVIN J. LISKA
MAURICE B. FRIEDMAN
FOR APPELLEES

AFFIRMED

Plaintiff-appellant, George J. Roux, was suspended and later, on April 23, 1968, dismissed from his job as a patrolman with civil service status in the New Orleans Police Department. From a ruling of the Civil Service Commission holding that his appeal from the suspension was not timely filed, but affirming his dismissal from the police department, appellant appealed.

Appellant was notified of his dismissal by letter from the Superintendent of Police in which he set forth in detail the circumstances leading to his order that appellant submit to a polygraph examination which he refused to undergo, and the superintendent's conclusion that such refusal amounted to misconduct connected with his work. We quote the letter herewith in extenso:

"April 23, 1968

"Patrolman George J. Roux
Badge #1336 - Payroll #3163
4467 Pluto Orchard Drive
New Orleans, Louisiana 70127

"Dear Patrolman Roux:

"Monday, February 26, 1968, shortly after the homocide investigation relating to Miss Susan Goldman was initiated, it was learned that Miss Goldman was acquainted with a number of police officers, most of whom were assigned to the First and Eighth Districts.

"As it was entirely possible that several of the police officers who had been acquainted

with Miss Goldman were in possession of important information relating to the homicide investigation, and additionally, may not have been aware of the importance of such information, I instructed Captain Henry Morris, Chief of Detectives, to question officers assigned to the First and Eighth Districts for the purpose of collecting any and all information known to these officers regarding Miss Goldman.

"In order to insure the integrity of the Police Department, I further instructed Captain Morris to have those officers questioned verify their statements through polygraph examination, an investigative procedure normally followed in such investigations.

"As police officers occupy a position of public trust, and as it is a police officer's sworn duty to uphold the law and assist in exposing criminal misconduct, it was anticipated that all officers called upon to cooperate in this investigation would do so on an entirely voluntary basis.

"In the event any officer failed to cooperate fully with investigators by refusing to voluntarily make a statement or by refusing to voluntarily verify their statement through polygraph examination, I instructed Captain Morris to order either or both actions on the part of the uncooperative officer. While this is the first occasion in which polygraph examinations were to be ordered during my tenure as Police Superintendent, the seriousness of the matter under

investigation, namely, murder, and the known association of many police officers with Miss Goldman prior to her death, these facts required much determined action if the integrity of the Police Department was to be preserved.

"March 6, 1968, at about 4:00 P.M., you were called upon to cooperate with investigating officers as heretofore indicated. At this time you did answer questions, however, when asked by Captain Morris to voluntarily submit to a polygraph examination, being further advised of the investigative need for such cooperation, you refused. This refusal to cooperate during an official investigation reflected discredit upon you as a police officer and constituted violation of Articles 27 and 59 of the 'Rules for the Administration of the Department of Police,' which read as follows:

> "*Article 27. Standard of ethics*
>
> 'A member shall always conduct himself in accordance with the highest degree of morality which is required of the law enforcement profession.
>
> 'He shall act in a manner which will not reflect discredit upon himself or the Department.'
>
> "*Article 59. Cooperation*
>
> 'A member shall promptly and sincerely cooperate with other members in the performance of their duty and with

all persons in carrying out the provisions of this Title.'

"In view of this you were ordered by Captain Morris to verify your statement, made in connection with the official homicide investigation relative to Miss Goldman, through polygraph examination and you refused. Such refusal reflected discredit upon you as a police officer and constituted, in total, violation of Article 27 of the 'Rules for the Administration of the Department of Police,' heretofore quoted, and Article 54 of these same rules, which reads as follows:

"*Article 54. Instructions from proper authority*

'A member shall promptly and fully abide by or execute instructions issuing from any authoritative source.

'If the instructions are reasonably believed to conflict with these Rules or other instructions this fact shall respectfully be made known to the issuing authority. If the issuing authority elects to insist upon the execution of the instructions then only he shall be held responsible should such conflict materialize.

'However, no instructions shall be issued or executed which are violative of any law.'

"Upon refusing to comply with Captain Morris' direct order you were suspended from the Police Department at about 4:30 P.M., March 6, 1968.

"March 21, 1968, you reported to Captain Joseph H. Murry, as instructed, and were counselled and questioned regarding your refusal to voluntarily submit to polygraph examination, and also your refusal to comply with Captain Morris' order directing you to submit to such examination. At this time, the position of the Police Department was outlined, however, you remained steadfast in your position. During the statement made by you on this occasion, you indicated that you felt you had a constitutional and civil right to refuse to take a polygraph examination and that Captain Morris did not have the authority to order you to take such a test.

"March 27, 1968, you reported to my office, as instructed, along with three other officers who had taken identical positions. At your request, your attorney, Mr. Sanford Krasnoff, was present at this meeting. As the meeting progressed, I asked you if you would cooperate in the investigation by voluntarily taking a polygraph examination. You indicated that you would not. I then advised you that I was ordering you to take a polygraph examination and asked you if you would obey this order. You again indicated that you would not. These refusals constituted violations of Articles 27, 54

and 59 of the 'Rules for the Administration of the Department of Police,' heretofore quoted.

"As a result of the heretofore outlined misconduct, I am dismissing you from the Police Department, such dismissal effective immediately.

Yours very truly,

s/ JOSEPH I. GIARRUSSO
JOSEPH I. GIARRUSSO
Superintendent of Police"

JIG:mes

The case was heard before the Civil Service Commission on May 24, 1968, both appellant and the appointing authority being represented by counsel at the hearing. In sustaining the appellant's dismissal from the police department by the Superintendent, the Commission found that there was uncontradicted testimony that "at no time was Roux asked or ordered to waive immunity from prosecution"; that Roux was informed that he was not a suspect to any crime, nor was he charged with any crime, arrested for nor threatened with charges, and that he was not threatened with dismissal if the results of the polygraph tests were adverse to him.

The appeal in this matter lies to this appellate court as a result of Article VII, Sections 10 and 29, as amended, and the jurisprudence of the state. The appellate jurisdiction of this court is limited by Article 14, Section 15 (O)(1) of the Constitution of Louisiana which

provides that the decision of the Civil Service Commission shall be final on the facts, but an appeal shall be granted on any question of law. The question which we must determine and upon which appellant bases this appeal is a constitutional one.

In the ruling of the Commission here it was found that on March 27, 1968, appellant was instructed to report to the office of the superintendent of police where, in the presence of his legal counsel, appellant refused the superintendent's request that he voluntarily submit to the polygraph test; that appellant was again vited Article XIV, Section 15 (P) (1) of the Louisiana Constitution of 1921, denying members of the classified service the privilege of retaining their classified position while choosing to remain silent when questioned about municipal affairs or conduct of municipal employees; that appellant and his counsel were also offered the opportunity to review and agree which questions would be included in the proposed polygraph test, all to no avail, and that upon being given a direct order to take a polygraph test, appellant refused and his dismissal became effective at that time because of his refusal to obey a direct order of the superintendent and his failure to cooperate in the intra-departmental investigation.

Article XIV, Section 15 (P)(1) of the Louisiana Constitution relating to the rights and obligations of Civil Service employees provides:

> "If any member of the State or City Commissions or any officer or employee in the State or City Civil Service shall willfully refuse or

> fail to appear before any Civil Service Commission, court, or judge, any legislative committee or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or answer any question relating to the affairs or government of the State or city, or the conduct of any State or city officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of [illegible] which he may be asked to testify at any such hearing or inquiry, he shall forfeit his office or position * * * *"

Appellant argues that the article of the Constitution merely requires Roux,"* * * to testify or answer any questions relating to the affairs or government * * * or [his] conduct, * * *" and nothing more. He contends that the Constitution does not vest in the appointing authority the power to order him or any employee to submit to a polygraph examination and that if he is so authorized such a requirement is unlawful and serves to deny Roux due process of law guaranteed by both the Federal and State Constitutions and is unconstitutional. In support of his argument that the acts of the appointing authority denied him the privilege against self-incrimination, counsel cite Uniformed Sanitation Men Assoc. v. Commission, 392 U.S. 280, 88 S.Ct. 1917 (1968) and Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913 (1968) and assert that these decisions are controlling in this case.

In the Uniform Sanitation Men's case, supra, employees of the department were dismissed after they invoked the Fifth Amendment of the Federal Constitution and refused to testify in an investigation being conducted by the Commissioner into alleged corrupt practices in the department. These employees were informed that whatever they said would be held against them. Three of the appellants answered the questions but when called before the Grand Jury they invoked the silence of the Fifth Amendment, and for that reason were dismissed from their employment after having been instructed to sign waivers of immunity from subsequent prosecution. In the Gardner case, supra, a New York City policeman was called before the Grand Jury investigating gambling activities and ordered to sign a waiver of immunity from prosecution and then answer all questions which he refused to do. He was dismissed solely for refusing to waive his constitutional privilege against self-incrimination. In both cases the Supreme Court held that the employee's constitutional guarantees had been violated. However, the Court specifically recognized and upheld the right of an appointing authority to discharge municipal employees for refusal to account for "their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

In this case in which Roux before the Commission laid much stress on the fact that he believed himself to be a suspect in the homicide investigation, the Commission found that this position was inconsistent with the evidence inasmuch as appellant was at no time asked to waive immunity. This Court in Callahan v.

New Orleans Police Department, 171 So.2d 730, pointed out that the police officer in that case was charged with a crime in the criminal court and his case was pending for trial, but that he was not disqualified from state civil service employment under any assumption or implication of guilt of charges against him as a result of his having invoked the Fifth Amendment. He was discharged because he refused to testify before the Commission. In holding that Article XIV, Section 15 (P) (1) of the Constitution was within the rule of reasonable exercise of the police power of the State and within the limits of due process, the Court said:

> "* * * A police officer who refuses to cooperate with the proper authority of the city by which he is employed; who refuses to give information within his knowledge; or who impedes or hinders the inquiry by the proper authorities into violations of the law which he has sworn to uphold and defend, is no longer of any value to the city as a police officer. Any law which declares and renders such officer disqualified from continuation in public service is within the limits of the reasonable exercise of the police power of the State and not violative of due process. State v. Southwestern Electric Power Company, 127 So.2d 309 (La.App. 2d Cir. 1961), pp. 315-316."

Appellant insists, and this is shown by the record to be true, that he cooperated in the investigation to the extent of answering all questions, giving several written statements, and voluntarily submitting to physical examinations. However, when asked to answer questions

in a polygraph test for the "expressly explained purpose of attempted verification of earlier statements he refused because, first, to his knowledge "the polygraph test was not an accurate device and that its results were inadmissible as valid evidence in a court of law; second, that due to its inaccuracy, appellant feared the results of the test would jeopardize his reputation and career; third, that he was in a dilemma having to choose between taking and perhaps failing the test which might result in changes being brought against him, or refusing to take the test and being suspended or dismissed because of his refusal; fourth, that he had a constitutional right to refuse to take a polygraph test and that the Police Manual with respect to the rights of an arrestee provided that no citizen could be compelled to take the test; and, finally, that his superiors had no cause or reason to doubt his veracity and ask that he submit to the test for the purpose of verifying his prior statements."

As we said in the Callahan case, the police officer has no inalienable right to employment as a police officer; "* * * the paramount right of the people of the City of New Orleans to protection against law violation far transcends any right Callahan has to employment in a position, for which by his actions, he has demonstrated his unfitness and disqualification. * * *" It is our conclusion that Roux's refusal to submit to the polygraph test, thereby impeding and hindering the inquiry into violations of the law which he was sworn to uphold and defend was an act of misconduct on his part as a result of which he could no longer be said to possess the high standards of conduct required of a policeman. The order was reasonable and within the limits of due process.

As to the question of whether the order to submit to the test was a reasonable order, the Commission found the appointing authority proved that it did not exceed its authority and that it acted reasonably under all of the circumstances of the case, and that the burden to show otherwise was not carried by appellant. The Commission said:

> "The circumstances of the case required an interview of and scrutiny of the activities of numerous officers, the urgency thereof being emphasized to ensure against departmental scandal as well as to investigate and quickly solve an apparent homicide. After appellant's suspension and continued refusal to obey an order, the thrust of the appointing authority's position shifted from concern over the use of the polygraph test as an investigatory aid to concern over the appellant's refusal to obey a direct order of a superior officer."

Counsel for appellant have referred to three cases in other jurisdictions in which dismissals were not allowed upon refusal to take polygraph tests, and appellee has cited three cases in which the polygraph test was refused by policemen and their dismissal for such refusal was upheld. While the jurisprudence of other states is persuasive, as has been said often by the courts of this state, it is not controlling.

In Molino v. Board of Pub. Safe. of City of Torrington, 255 A.2d 805, cited by appellant, the Supreme Court of Connecticut, in 1966, held that policeman had not been dismissed for cause. There three police officers were

discovered early in the morning hours, two inside a building, and one sitting in an automobile on the premises. The officers were required to report the incident but failed to do so. It was called to the attention of the Chief of Police by the owner of the building and an investigation was started. The officers contended that they were checking the building, and they were not charged with any act of criminal activity, nor were they charged with an act of insubordination or with any immoral or antisocial conduct. The Board of Public Safety directed the chief of police to ask the officers to submit to a polygraph test and he then notified them that they must take the test or be suspended.

Upon their refusal to take the test, they were suspended "for refusal to cooperate in an investigation." The attorney for the plaintiffs asked for the reasons for their suspension and in a letter to him the chief of police listed several charges of violation of sections of the police manual. The Board had authority to suspend, expel and remove any member of the police department only for cause. The question was whether the cause assigned constituted, of itself, ground for removal, which the Court said is a judicial question, and it decided the question of whether the Board acted arbitrarily, illegally or so unreasonably as to abuse its wide discretion and said that that burden rested upon the plaintiffs. One of the charges was the violation of the section of the regulations of the police manual by refusing to take a polygraph. But the Court said that that section only required that a policeman be truthful and, therefore, in the absence of any evidence, and as no one claimed that the policemen were untruthful in statements given by them, and also due to the unreliability

of the polygraph test as proof of truthfulness, the refusal was not a violation of the section. The Court concluded that all the "charges assigned could not, on the evidence before the Board, constitute grounds for dismissing the plaintiffs."

The Court, in the Molino case, supra, considered the case of DeVito and Stape v. Civil Service Commission, 404 Pa. 354, 172 A.2d 161, cited by appellant holding that the refusal was not just cause for dismissal. The three cases cited by appellee, in which orders to take polygraph tests by police officers were sustained, McCain v. Sheridan, 160 Cal. App.2d 174, 324 P.2d 823; and Frazee v. Civil Service Board of Oakland, 170 Cal.App.2d 333, 338 P.2d 943, Fichera v. State Personnel Board, 217 Cal. App.2d 613, 32 Cal. Reptr. 159, were referred to by the Court and it stated that in the two first named cases the officers were implicated in a crime and their dismissals were upheld because of refusal to take the test; and that in the Fichera case the dismissal was approved although there was no accusation of crime.

We are guided to a great extent in our holding in the present case by what the Court said in the Fichera case, and we say also that there may be many circumstances wherein a superior's order that a subordinate officer submit to a polygraph test would be unreasonable. We quote as follows from that case:

> "The polygraph is an extension of the age-old process of assessing the veracity of a witness, by scrutinizing his facial expression, rubescence, tremors, evasion of meeting the eye, and the like. It works through externals and is

quite distinct from drug induced revelation; hypnosis, or any other form of narco-analysis. In the limited field of cases such as this one, and those of the prior cases cited above, we find no deprivation of constitutional or legal rights.

"It may be conceded that there is a considerable degree of fallibility with the polygraph (see Sholnick, Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection, 70 Yale L.J. 694). It is considered to have enough reliability to justify the admission of expert testimony in the courts based on its results, and a person's willingness or unwillingness to take the test is without enough probative value to justify its admission. (People v. Carter, 48 Cal. 2d 737, 752, 312 P.2d 665.) It was recognized in the Frazee case, however, that it does not follow that the tests are completely without value (170 Cal.App.2d at p. 335, 338 P.2d at pp. 944-945). The test might have proved useful in limiting and channeling the investigation in this case, in which three officers besides appellants were directed to take the tests, and acceded. It might have been an instrument of exculpation and vindication, on the one hand, or of more intensive investigation of the subjects of the test, on the other. We cannot, of course, tell what would have been the ruling of the State Personnel Board, or what our own ruling might have been, had the tests been taken and had produced results considered damaging by appellants' superiors. We do hold, however,

that appellants were not entitled to withhold this means of investigation and at the same time retain their positions as officers of the California State Police."

While appellant's refusal to obey the order is not evidence of guilt or of knowledge of the identity of the guilty party, he may not be permitted to refuse to take the polygraph test in view of his sworn duty to cooperate in the investigation of crime. Under all the circumstances in this matter, we find that the order was reasonable.

For the above and foregoing reasons, the decree of the Civil Service Commission maintaining the dismissal of appellant from the New Orleans Police Department is hereby affirmed. Costs are to be paid by appellant.

AFFIRMED

Rehearing Refused July 7, 1969
Writ Refused Oct. 23, 1969

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

Filed: Oct. 28, 1969

GEORGE J. ROUX

vs. No. 50,065

NEW ORLEANS POLICE DEPARTMENT

October 23, 1969

In re: George J. Roux applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Civil Service Commission of the City of New Orleans, No. 440-A

Writ Refused.

We find no error of law in the judgment of the Court of Appeal.

/s/ EHMcC
/s/ JBF
/s/ JBH
/s/ WBH
/s/ JWS
/s/ FWS

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, October 23, 1969
s/ WALLACE MILLER
Deputy Clerk